

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

RATE ADJUSTMENT DUE TO EXTRAORDINARY OR
EXCEPTIONAL CIRCUMSTANCES

Docket No. R2013-11R

**REPLY COMMENTS OF
THE GREETING CARD ASSOCIATION AND THE
THE NATIONAL POSTAL POLICY COUNCIL**
(July 6, 2015)

The Greeting Card Association (“GCA”) and the National Postal Policy Council (“NPPC”) respectfully submit this reply to the various comments on Order No. 2540.¹

GCA and NPPC agree with the Postal Service that the only issue remanded to the Commission by *Alliance of Nonprofit Mailers v. Postal Regulatory Commission*, No. 14-1009 (Slip Op. June 5, 2015) (“ANM”) – the “count once” approach – “involves nothing more than a simple set of computations derived entirely from volume figures that the Commission has already established as representing incremental recession-related volume losses in each year.”² GCA and NPPC explained in their opening comments how that simple set of computations is to be done. It is the only method proposed that is

¹ Notice and Order Establishing Procedures on Remand and Suspending the 45-Day Notice Requirement for Removing the Exigent Surcharge (June 12, 2015), 80 *Fed. Reg.* 34937 (June 18, 2015).

² Initial Comments of the United States Postal Service In Response to Commission Order No. 2540, at 2 (June 26, 2015) (“USPS Comments”).

firmly based on the record. As shown in Section I below, that amounts to an additional count of volume lost due to the recession of approximately 4 billion pieces, equating to an additional recovery of approximately \$600 million.

Unfortunately, despite understanding the straightforward nature of the remand, the Postal Service has not performed the “simple set of calculations” correctly. Furthermore, the Postal Service seeks to relitigate settled issues and to introduce – five years after this case began -- new theories and lines of argument. If tolerated, this will open the door to endless litigation (this case has already lasted more than twice as long as the recession itself), and convert the exigency provision into an exception that trumps the price cap, which the Commission has repeatedly recognized is the cornerstone of the statute.

Nothing in the *ANM* decision requires the Commission to allow the Postal Service to relitigate issues that have been decided in Order No. 864 or Order No. 1926 and affirmed by the Court of Appeals, or to entertain its latest arguments. The Court affirmed the Commission on all other issues, including the start of the new normal. The Commission should simply address the “count once” issue that was remanded to it, and bring finality to this proceeding.

If, nonetheless, the Commission were to decide to reopen settled issues and prolong this proceeding, due process would require that: (1) the Commission and mailers have sufficient time to question and assess the latest theories, conduct a hearing, and submit full briefing; and (2) the Commission protect mailers against over-recovery and avoid any appearance of prejudgment by an

order directing the Postal Service to remove the current surcharge once it has collected \$2.766 billion.

I. THE REMAND CONCERNS ONLY THE NARROW ISSUE OF “COUNT ONCE,” AND THE GCA/NPPC APPROACH IS THE ONLY COUNTING METHOD CONSISTENT WITH THE RECORD

The *only* issue on which the Court of Appeals remanded this case to the Commission was the “count once” rule. As GCA and NPPC explained in their opening comments, the Commission should respond to the *ANM* Court’s directive by using a counting procedure that applies the results of the approved econometric models to measure the volumes lost “due to” the recession and not for other reasons, applied afresh on a year-by-year basis. That approach is based entirely upon the existing record, and is without question a supportable quantification method under Order No. 864.

The Postal Service’s “count every piece every year” (and more) approach begs the very question facing the Commission on remand, which is to determine what volume of mail was lost due to the “extraordinary or exceptional” circumstance of the recession. The question on remand is whether a piece lost in Year 1 due to the recession must be considered a recession-caused lost piece in Year 2 and Year 3, or (if still lost) could it become lost for other reasons, such as electronic diversion. The Postal Service *assumes* that a piece lost because of the recession in Year 1 remains permanently lost because of the recession in Years 2, 3, and for years thereafter until the arrival of the new normal, because it does not consider that pieces would leave for non-recessionary reasons in

subsequent years. The Commission's "count once" approach considered a piece as lost only in Year 1.³

Unlike the "count once" or "count every piece every year" approaches, the GCA/NPPC approach answers that question by applying the results from the approved econometrics afresh each year to differentiate volume losses due to the recession from other losses. In so doing, it relies on the Commission's expertise as expressed in the econometric model.⁴ GCA/NPPC's revisiting of the cable subscriber example proffered by the Postal Service (who drops her subscription in Year 1 but, having reordered her economic priorities, renews it in Year 2 but simultaneously switches to on-line bill payment – making the lost pieces no longer a consequence of the recession) illustrates why the step is necessary and how the Service's proposed procedure falls short of the "due to" requirement. In contrast, the Postal Service's "count every piece every year" approach, which assumes losses due to the recession are permanent, is simply a "mechanical tally of the time passed since the recession" of the type disapproved by the Court.⁵

³ Thus, the Commission made no "out year" findings in Order No. 1926. Any notion that if the "count once" rule is "mechanistically" undone the correct results will stand revealed is therefore false.

⁴ *Accord* Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc., Initial Comments In Response To Order No. 2540, at 9-12 (June 26, 2015) (noting that Commission should use its expertise in counting lost mail).

⁵ *ANM*, Slip Op. at 17; see Public Representative Comments Concerning Methodological Approach For Accounting For Volume Losses Due To The Great Recession, at 5 (June 26, 2015) (criticizing the Postal Service's "count every piece every year" approach as mechanically counting mail pieces up to the exact time when the new normal is reached).

In addition, the Postal Service has already recognized that its approach is flawed because it likely double-counts pieces. Its comments acknowledged the “concern that, of a given number of pieces that are identified as lost due to the macro-economic effects of the Great Recession in one year, some portion of those pieces may be ones that, even in the absence of the Great Recession, would have been lost to electronic diversion in a subsequent year anyway” and conceded that this concern had at least “superficial merit.” *USPS Comments* at 33-34. The Postal Service further conceded that “if the object of the exercise is to identify pieces lost exclusively to the Great Recession, it could be argued that the portion representing overlap “should be omitted from the count of Great Recession losses in those later years.” *Id.* The adjustment made in the GCA/NPPC counting approach precisely addresses that overlap by taking into account the likelihood that some recession-related losses would have left the mail in subsequent years for other reasons. The Postal Service’s attempt (*USPS Comments* at 34) to assume away this problem on the ground that so many other pieces were lost is unavailing, because it relies entirely on disregarding the new normal that is the law of the case.

The GCA and NPPC approach yields a total volume of mail lost due to the recession of approximately 31.381 billion pieces before the new normal was achieved, which works out to a net loss of contribution (using FY14 anticipated unit contributions) of \$3.373 billion.⁶ Of that, \$2.766 billion is being collected currently by the surcharge. Those totals, which properly exclude pieces that

⁶ The spreadsheets supporting this calculation are being filed concurrently as GCA/NPPC-LR-2013-11R-1.

would have converted to electronic alternatives even had the recession not occurred, fall approximately midway between the totals reached under the “count once” and “count every piece every year” approaches.

The Public Representative, reiterating his position in 2013, invited the Commission to forget about counting pieces and launch into an alternative method that would be based on the one-time costs of re-sizing the postal network. As the Public Representative himself admits, that approach depends upon the Postal Service to provide an estimate of those costs, which it has not done.⁷ But there is no need for the Commission to do so. Now, after five years of this proceeding, is not a time to initiate new analyses, introduce new data, or revisit concepts such as the new normal that the *ANM* decision affirmed.

Accordingly, the Commission should act promptly to resolve the “simple set of computations” suggested by GCA/NPPC, and conclude this case. If the Commission takes any other course, it should remove the current surcharge, as noted below, while further proceedings take place.

II. EXTENDING THE SURCHARGE WOULD VIOLATE THE “REASONABLE AND EQUITABLE AND NECESSARY” STANDARD

Whatever counting method the Commission adopts can address only the “due to” quantification of lost contribution. See *United States Postal Service v. Postal Regulatory Commission*, 640 F.3d 1263 (D.C. Cir. 2011); Order No. 864 at 25. Whether the Postal Service may *recover* any portion of any amount found “due to” the recession beyond the current \$2.766 billion recovery is subject to the

⁷ Public Representative Comments at 3.

“reasonable and equitable and necessary” provision of Section 3622(d)(1)(E).

GCA and NPPC submit that it would not be reasonable or equitable or necessary for the Postal Service to recover any additional amount at this point in the case.

The Commission has repeatedly affirmed that the price cap is the “cornerstone” of the ratemaking system under the Postal Accountability and Enhancement Act (“PAEA”) and the exigency provision is a “special limited exception.” See Order No. 864 at 3; Order No. 1926 at 175.⁸ The Postal Service recites a litany of its various financial challenges.⁹ But perpetuating the surcharge would convert a “special limited exception” into the routine way of doing business. That is neither reasonable nor consistent with the Congressional intent.

In Order No. 1926, the Commission confined its discussion of “reasonableness” to the size of the exigent surcharge, taking into account mailers’ ability to cope with the surcharge. Here, the Postal Service offers its financial wish list to justify the surcharge, but it ignores its potential impact on mailers. If the Commission is to consider the Postal Service’s woes – including those having little or nothing to do with the recession – then Order No. 1926

⁸ Accordingly, the Commission has held that the exigency provision does not authorize an indefinite surcharge. Order No. 1926 at 178 (stating “The Postal Service should be allowed to recover the lost contribution one time. It has not justified recovery of its losses repeatedly, through permanent incorporation of the recovery into the rates”). The Postal Service did not seek review of the Commission’s ruling that the exigency does not authorize a permanent circumvention of the price cap, and thus it is foreclosed from challenging it again at this time.

⁹ We note that the Postal Service’s balance sheet, as problematic as it may be, does not support a continued surcharge because it is vastly distorted by the \$5.5 billion annual retiree health benefit prefunding requirement imposed by law, and utterly unrelated to the recession, let alone “due to” it. The Postal Service has not made that payment for the last four years with no adverse consequences relevant to its ability to provide adequate postal services (which is the fundamental standard of the “necessary” test).

requires it also to consider the challenges facing the mailing industry and the mail using consumer.

We understand why the Postal Service would like to raise rates to collect unwarranted millions or billions of additional dollars from its customers, but it is not reasonable for it to do so when those businesses and consumers are themselves facing immense challenges. Many of the Service's partners in the supply chain that depend on selling mail – paper and printing – cannot pass along the surcharge to their customers by raising their prices. Not long ago, a typical business mailer spent one-third of its postal budget on postage, a third on paper, and a third on preparation and printing. Today, as much as two-thirds goes to postage, and one-third to the rest. Continuing an artificially high postage rate will impose an ongoing burden on mailers that simply cannot absorb it.

A “reasonable” surcharge must also be consistent with best practices of good management. A well-run business facing steadily declining demand for its most profitable product (here, First-Class Mail) would strive to reduce prices and improve service. The Postal Service has done just the opposite.¹⁰ To now continue to impose a surcharge on mailers when postal rates have been the only distribution cost that has defied market forces and continued to rise during and after the recession, a consequence of the monopoly status on paper communications that the Postal Service continues to enjoy, seems the

¹⁰ And, of course, the list of costly mismanaged postal initiatives grows steadily. *E.g.*, Office of Inspector General Audit Report No. MI-AR-15-004 (June 12, 2015) (identifying problems in “Delivery Results, Innovation, Value and Efficiency Initiative 30”); Office of Inspector General Audit Report SM-AR-15-005 (June 17, 2015) (mismanagement of Agilex Technologies mobile device contract wasted nearly \$4 million).

embodiment of unreasonableness. Imposing the surcharge to date, on a postal marketplace every bit as stung by the recession and its aftermath as the Postal Service, already has squeezed or eliminated the profitability and the ability to innovate of mailers in every market-dominant class. It is also unreasonable in the face of the ongoing migration of high contribution mail to electronic alternatives.

Because an exigency provision is a “limited exception,” the duration of a surcharge bears upon its reasonableness. Although protesting that this time it’s different (*Comments* at 38-39), the Postal Service pleads yet again for what would amount to an indefinite surcharge through at least 2021. A surcharge of that duration is not a “special limited exception” to the price cap in any reasonable sense. There is nothing “special” or “limited” about a surcharge that lasts as much as seven years. Perhaps the Postal Service desires a return to cost-of-service ratemaking. But that has not been the law for nearly a decade, and the Commission is the wrong body from which to seek a *de facto* reversion to that outdated system.

The recession ended six years ago. The Commission found in the most recent fiscal year that the Postal Service earned an operating profit, and it apparently would have done so even had the surcharge not been in effect.¹¹ Fiscal Year 2014 Financial Analysis Report, at 2 (April 1, 2015) (net operating income of \$1.4 billion). The Postal Service does not need a continued surcharge

¹¹ The surcharge was in effect for only part of FY2014, so it is evident that it contributed less than \$1.6 billion to Postal Service revenues.

“to get back on its feet.” *ANM*, Slip Op. at 13. It is no longer reasonable to impose an exigent surcharge.¹²

III. THE COMMISSION SHOULD NOT ALLOW RELITIGATION OF SETTLED ISSUES OR PROLONG THIS PROCEEDING TO ADDRESS NEW ISSUES

The Postal Service and the unions seek to relitigate a number of issues previously settled by the Commission in this proceeding and affirmed by the Court of Appeals. But the law of the case precludes consideration of most of these issues.¹³ Accordingly, GCA and NPPC will address only the major points raised.

The “inconsistency” argument in general. The Postal Service argues that there is an inconsistency between the Court-approved new normal analysis and the Commission’s findings, in another part of Order 1926, that the surcharge was necessary although the Service had made steps in adjusting to lower volume levels. *USPS Comments* at 7 *et seq.* This argument is essential to the Postal Service’s case; if it is shown to be invalid, the Service’s proposals elsewhere in its *Comments* will lack any foundation. We therefore start with it.

¹² The Commission found the 4.3 percent surcharge “equitable” because of its across-the-board nature. At that time, the Commission noted that “[t]he temporary rates (in the form of a surcharge) will be in place for a relatively short time, which militates against differential pricing that would cause some mailers to experience wide fluctuations in price.” Order No. 1926 at 168, n.144.

¹³ Even conceding *arguendo* that it was appropriate to raise them here, the important arguments advanced now have been considered and rejected already. Were the Commission to depart from its prior decisions, it would require a substantial demonstration that it appreciated what it was changing (among other things, a fundamental interpretation of an important provision of PAEA) and that it had good reasons for any such changes.

This argument that the new normal model is inconsistent with the Commission's finding that the surcharge was "necessary" depends entirely on the notion – already rejected by the Court¹⁴ – that quantifying the loss, and hence the maximum permissible recovery, is a function of the assessment of necessity. The necessity standard is one of operational adequacy, not quantification of the lawful revenue increment. It requires the Commission, *after quantifying the damage caused by the exigent event*, to decide whether a revenue increment of that magnitude is needed to maintain adequate postal services. In this case, the Commission did so, with subsequent judicial approval. (Its only error, the Court found, lay in *how* it quantified the damage through its use of the count-once rule.)

The Postal Service's approach in the Court of Appeals, and again here, ignores the established principle that whatever dollars are recovered through an exigency increase must equate to the loss *due to* the exigent event. That event is not merely an occasion for whatever additional revenue the Postal Service considers necessary to maintain adequate service.¹⁵ It follows that the new normal analysis cannot be inconsistent with the finding of necessity, since the latter finding neither contains nor implies anything for it to be inconsistent with.¹⁶

¹⁴ ANM, Slip Op. at 13.

¹⁵ That position was rejected by the same Court in *United States Postal Service v. Postal Regulatory Commission*, 640 F.3d 1263 (D.C. Cir. 2011). It held that the rate *adjustment* – that is, the amount of new revenue to be raised – was properly declared by the Commission to depend on the "due to" relationship. The Commission had rejected the first exigency request because the proposed adjustment addressed not the effects of the recession but "long-term structural problems not caused by the recent recession" – which are precisely those the Service points to on pages 40 to 50 of its *Comments*.

¹⁶ The Court's observation (Slip Op. at 17, n.3) that the Commission is "free to" consider the inconsistency issue on remand thus reduces to a truism. That does not mean that the

As the Court made clear (Slip Op. at 13), the necessity finding is made *after* the Commission has established and quantified what the panel called “the now-defined exigency.”

The Postal Service’s (re)definition of “new normal.” Although the Postal Service concedes that the Commission need not revisit the “new normal,” (*USPS Comments* at 7), it nonetheless attempts to redefine it. The Postal Service argues that the Commission improperly conflated two meanings of “new normal” – the point at which extraordinary or exceptional recession-driven volume losses cease, and the point at which the Service “should have been able to adjust its operations to that environment[.]” At p. 8, The Postal Service goes on to say:

Taken together, then, the Commission’s holding is essentially that the “new normal” is the point at which the Postal Service was able to adjust its operations in response to the shift in the level of mail volume.

That simply is not what the Commission held; indeed, it is a gross mischaracterization. Instead, the Commission held, first, that the new normal would come about “when all or most of the following occur” – the four indicators being (i) macro variables returning to “near historic positive trends,” (ii) application of macro variables predicting change accurately, and mail volume change being positive, (iii) the Service again being able to predict volumes accurately, and (iv) “the Postal Service demonstrat[ing] an ability to adjust

appropriate result is any less clearly a ruling limiting this remand proceeding to an appropriate change to the “count-once” rule.

operations to the lower volumes.” Order No. 1926 at 86.¹⁷ The *ANM* Court affirmed the Commission on the new normal, so the matter is the law of the case. Thus, the Postal Service ignores the *ANM* Court’s affirming of (i) the three tests other than its ability to adjust, and (ii) that Order No. 1926 does *not* require all four to be met. Hence its quoted characterization of the Commission’s holding is inaccurate.¹⁸

Second, the Postal Service goes on to argue that:

Because there is inherently a gap between the time when the permanent shift in mail volume occurred and the time when the Postal Service could meaningfully respond to it, the Commission on remand should not continue to act as though both dates necessarily or logically fold together under the phrase “new normal.”

USPS Comments at 10. The “time when the permanent shift in mail volume occurred” *is* the new normal, as the Commission properly held, because that point is when the effects of the recession cease to be extraordinary or exceptional. The first three of the four tests outlined above are meant to identify it. When macro indicators stabilize, when applying them yields accurate predictions and mail volumes trend up again, and when the Postal Service can accurately predict its volumes, then the new normal *as defined economically* has

¹⁷ In a hypothetical situation in which the macro variables were behaving normally, mail volume trends were positive, and the Postal Service could accurately predict volumes, *but* the Service had not shown an ability to adjust operations, the Commission’s formulation would still justify a finding that the new normal had arrived.

¹⁸ It is also worth noting that the Commission did not define its fourth test as “the point at which the Postal Service [is] able to adjust its operations in response to the shift” but as the point at which it “demonstrates an ability” to do so. In Order No. 1926 (at 94), the Commission said: “Once impact of a circumstance is normal, and the Postal Service *has begun to adjust to it*, additional impact cannot be said to be due to a past extraordinary or exceptional circumstance” (emphasis added).

arrived. The Commission defined the new normal as occurring when “all or most” of the four tests had been met, and that decision was affirmed in *ANM*. Thus, the matter is settled for purposes of this case.

Nonetheless, the Postal Service tries to relitigate the matter by first reading “or most” out of Order No. 1926, and then ignoring all the new normal tests except its own ability to adjust to lower volumes. If the arrival of the economically-defined new normal does not coincide in time with the Service’s *actual* ability to adjust operations to it, Order No. 1926, as affirmed by *ANM*, still allows a finding that the new normal dates to the economically-defined point. If the new normal had to await the Postal Service’s *actual* success in adjusting to the reduced volume level, then the exceptional or extraordinary character of the recession – which justified the increase in the first place – would be prolonged far beyond the point at which the economy was no longer exhibiting that character.

In short, the Postal Service has improperly attempted to relitigate an issue already decided by the Commission and specifically affirmed by the Court – so thus is the law of the case. In doing so it has taken the framework of the Commission’s new normal analysis, thrown away most of it, and argued that what is left over makes the analysis as a whole inconsistent with the part¹⁹ it has chosen not to disregard. The Commission should reject its argument.

The starting point of the new normal. The Postal Service also invites the Commission to reinterpret settled issues, such as the starting point for the new normal for Standard Mail (FY2010) and for all classes generally (through

¹⁹ Or, perhaps better, its idiosyncratic interpretation of that part.

FY2012). The Commission considered and rejected these same contentions in Order No. 1926, and the *ANM* Court specifically affirmed. Slip Op. at 14. Those matters are now the law of the case, and are not properly subject to relitigation. Indeed, even were the Commission to consider any new evidence, it would need to reopen the record.

The Commission's treatment of linear intervention variables. In Order No. 1926, the Commission determined that the linear intervention variables included by the Postal Service in its proposed econometric model reflected trends that were due to factors other than the recession. Order No. 1926 at 82. The Court of Appeals specifically affirmed the Commission on this very point. Slip Op. at 15.

Therefore, this issue has already been settled for purposes of this proceeding. Accordingly, the Commission should give no heed to the Postal Service's latest attempt to re-argue that its linear intervention variables should be taken into consideration. *USPS Comments* at 33.

The role of the exigency provision in PAEA: the tail wagging the dog? We showed above that determining the financial cost of the recession, and thus the permissible recovery, are part of the "due to" analysis and thus precedes any decision under the "necessary" standard. The Postal Service's contrary view thus conflicts with the well-established principle that the exigency provision is a narrow exception to the price cap. In Order No. 1926, the Commission said:

The price cap is the centerpiece of the PAEA's regulatory paradigm. The exigent rate provision in section

3622(d)(1)(E) is a narrow exception to the price cap. To be permitted, exigent rate increases must be “due to” “extraordinary or exceptional” circumstances. *If the proposed adjustments fail to meet the “due to” test, they are prohibited even if they might otherwise be considered “reasonable and equitable and necessary.”* In other words, the “reasonable and equitable and necessary” clause is subordinate to the “due to” clause and can only be applied to justify rate adjustments that have first been shown to be “due to” “extraordinary or exceptional” circumstances. [Italics added.]

Order No. 1926 at 28. The Court specifically approved this reading of the structure of PAEA. Slip Op. at 12-13. Because the exigency here was the recession, and its endpoint is necessarily determined by economic phenomena (*i.e.*, the first three of the PRC’s four tests), the Postal Service’s attempt to redefine it by reference to only the fourth (non-economic²⁰) test runs counter to the principle established in Order No. 864²¹ and that governs postal rates.

The “necessity” finding. It may not be out of place to add a few words concerning the other term of the supposed “inconsistency,” the Commission’s finding that the rate adjustment was necessary.²² That finding was a response to parties’ arguments that, *e.g.*, the Service had not observed best practices of

²⁰ The distinction implied here entails taking the third of the Commission’s tests – the Service’s ability to predict volumes accurately – as a test of whether macroeconomic conditions allow such predictions. This seems to be a reasonable interpretation, as the duration of an exigency can hardly be made to depend on the Postal Service’s ability to hire competent econometric consultants.

²¹ The Court also observed (Slip Op. at 6) that Order No. 864 was the unchallenged “framework” for the case before it.

²² It is appropriate from a strictly logical viewpoint, at least, since it does not follow from an assertion that proposition A is inconsistent with proposition B that A must be true and B false. This is a largely theoretical point, since there is no present challenge to the necessity finding, but the Postal Service’s *Comments* at times read as though the inconsistency, were it established, would necessarily invalidate the new normal analysis.

honest, efficient, and economical management, or had delayed too long in seeking relief. See Order No. 1926 at 122 *et seq.*

The important fact is that these adverse comments did not bear on the quantification of the exigency damage, but on whether the Postal Service had failed to justify recovering it. Correspondingly, the Commission's finding concerned the Service's legal entitlement to (all of) it under the "reasonable, equitable, and necessary" test. As we pointed out earlier, nothing in the finding of necessity conflicts with the already-established quantification of the net adverse financial impact of the recession.

IV. THE CURRENT SURCHARGE MUST FIRST BE REMOVED IF THE POSTAL SERVICE'S LATEST THEORIES OF THE CASE ARE TO BE CONSIDERED

The Postal Service and the postal unions clearly seek to keep the current exigency surcharge in place until at least the year 2021, and apparently indefinitely.²³ As discussed in the preceding Section, the Commission should not entertain any further litigation of matters that it decided in Order No. 1926 and that were affirmed in *ANM*. Nor is there any need for the Commission to consider the new theories or econometric interpretations asserted by the Postal Service, and it should not do so.

If, however, the Commission chooses to reopen settled issues or entertain new arguments, it could not do so, consistent with due process, in the type of expedited proceeding envisioned by Order No. 2540. No less than when

²³ *USPS Comments* at 29 (asking for 6.33 years of the current 4.3 percent surcharge) & at 39 n.65 (implicitly assuming that Commission would retain surcharge after review under 39 U.S.C. §3622(d)(3)).

beginning a case, the Postal Service has the burden of supporting an exigent request “through supportable methods commensurate with the amount of the proposed adjustment.” Order No. 864 at 49. If the Commission has any intention of taking seriously the Postal Service’s request to perpetuate the surcharge until 2021, due process requires that mailers have a sufficient commensurate opportunity to examine the premises and new assertions offered by the Postal Service,²⁴ and that the Service provide witnesses subject to examination to support and defend its propositions.

The history of this case (which began in 2010) teaches that commenting on the issues before the Commission, issuance of the Commission’s decision on remand, and any subsequent judicial review is likely to take considerable time. It certainly cannot be fairly done in under a month, the presumptive timetable underlying Order No. 2540. And, as illustrated by the remand proceeding in Docket No. R2010-4, the proceeding could easily drag on without a clear termination date.

If the Commission chooses to take this route, it is essential that the current surcharge should first be removed. Accordingly, the Commission would have to lift the current suspension of the 45-day notice requirement and direct the Postal Service to remove the current surcharge once it has collected the \$2.766 billion in net contribution authorized by Order No. 1926. The Postal Service will arrive

²⁴ For example, the Postal Service relies on the Commission’s FY2013 Financial Analysis to support some of its arguments. That document is not in the record of this proceeding, and relies in part on an Annual Compliance Report filed a week after Order No. 1926 was released. It also raises extensive new matter in its arguments regarding the “reasonable and equitable and necessary” criterion. *USPS Comments* at 41-47.

at that total imminently, and currently has no legal authority to collect one penny beyond that amount.

Unless the surcharge were removed, its very existence would create strong pressure on the Commission in any further proceeding to approve at least enough additional recovery to justify the sums collected during the pendency of the proceeding. Fairness requires that the scales not be tipped in such a manner.

Second, leaving the surcharge in place would be unfair absent a clear means of preventing an overrecovery. The Postal Service's pledge in its June 8 *Motion* to continue to track and report collected revenue as required by Order No. 2319 does not suffice. Certainly the Postal Service has yet to propose any mechanism by which mailers could be made whole if it were to recover more money from the current surcharge during the remand proceedings than to which it is ultimately determined to be entitled.

Finally, both the Postal Service and the APWU argue that removing the surcharge would be disruptive. The Postal Service argues that the current surcharge should be retained because:

the mere specter of a sequence of rate changes consisting of alternating rate decreases and rate increases, with the attendant full burden of mail classification schedule changes and software revisions, would impose a needless burden on the Postal Service, the public, the mailing industry, and its supply chain.

USPS Motion at 3. NPPC is sympathetic to this concern, as the APWU notes,²⁵ and has long urged the Postal Service to minimize the

²⁵ Comments of the American Postal Workers Union, AFL-CIO, at 7-8 (June 26, 2015).

inconvenience and disruption associated with any postal rate change.

But it remains true that the first and most important virtue of a rate is to be lawful. “Stability” in the collection of an unlawful rate is no virtue.

While minimizing disruption is generally preferred, the implications and financial costs of extending the surcharge would substantially dwarf the cost of changing mailing software and other adjustments. The cost to a Presort business mailer to adjust to pricing changes can range from the five to mid-six digits; extending the surcharge would cost many larger mailers in the seven or eight figure range. Smaller business mailers paying Single-Piece rates would incur smaller, yet still significant charges. And the cost of perpetuating the surcharge is especially onerous on First Class mailers, who pay by far the largest amount of surcharge postage.

Moreover, in this instance the Governors have the full power to prevent such “disruption”: they simply could decline to impose any new surcharge if they fear the disruption would outweigh the financial benefits. Alternatively, the Governors could consider imposing any new surcharge concurrently with the next indexed price increase or perhaps find some other manner of imposing it that minimized disruption.

V. CONCLUSION

For the foregoing reasons, the Greeting Card Association and the National Postal Policy Council respectfully urge the Commission to address only the narrow issue specifically remanded to it, and to bring this case to a close.

Respectfully submitted,

GREETING CARD ASSOCIATION

David F. Stover
2970 S. Columbus St., No. 1B
Arlington, VA 22206-1450
(703) 998-2568
(703) 998-2987 fax
E-mail: postamp02@gmail.com

NATIONAL POSTAL POLICY COUNCIL

Arthur B. Sackler
Executive Director
NATIONAL POSTAL POLICY COUNCIL
1101 17th Street NW
Suite 1220
Washington DC 20036
Telephone: (202) 955-0097
E-Mail: art.sackler@postalcouncil.org

William B. Baker
POTOMAC LAW GROUP, PLLC
1300 Pennsylvania Avenue, N.W.
Suite 700
Washington, DC 20004
Telephone: (571) 317-1922
E-Mail: wbaker@potomacclaw.com